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No. 80-273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., ET AL.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE STATE OF MARYLAND IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that consent of Congress is not required, pursuant to Section 9 of the Rivers and Harbors Act of 1899, for the construction of the spoil disposal facility at Hart and Miller Islands in the Chesapeake Bay.

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JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on May 28, 1980. The Petition for Writ of Certiorari was filed August 22, 1980. The time for filing this Brief in Opposition has been extended until October 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 9 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. § 401 (hereinafter the "Act" or the "1899 Act"), provides in part:

> "It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any . . . navigable water of the United States until the consent of Congress to the building of such structure shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army . . . ."

Section 10 of the Act, 33 U.S.C. § 403, provides in part:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill [in a navigable waterway of the United States] . . . unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to begining the same."

The full text of these sections, together with the text of certain predecessor statutes, appears in the Appendix to the Petition for Writ of Certiorari ("App.").

STATEMENT

The Army Corps of Engineers ("Corps") issued a permit, pursuant to Section 10 of the 1899 Act, for the construction of a certain spoil disposal facility in the Chesapeake

Bay. Respondents contend that the permit is valid. Petitioners contend it is not valid on the theory that the project is a "dike" within the meaning of Section 9 of the Act.

1. Factual Background

The State of Maryland applied to the Corps on February 23, 1972, for a permit to construct a containment area adjacent to Hart and Miller Islands in the Chesapeake Bay. After public hearings in 1972 and 1975, as well as consideration of an environmental impact statement, pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321, et seq., on November 22, 1976, the Corps issued the permit to construct a spoil disposal facility for the containment of dredged materials.

Additionally, extensive public and private studies addressed the structural soundness and environmental acceptability of the project. Studies were performed on sedimentation and the erosion process by the Maryland Geological Survey. A wetlands productivity investigation was undertaken by the Maryland Department of Natural Resources. An analysis of the use of dredged spoil for aggregate was performed by the Maryland Environmental Service. A State-funded Peer Review Study critiqued the project design. The Corps carefully considered all matters raised by the studies and determined that the issuance of the permit was appropriate.

When completed, the structure at Hart and Miller Islands will extend no more than 4700 feet into the Bay in an area where the Bay is seven miles wide (App. 3a). While the Chesapeake Bay has 4300 square miles of water surface, the proposed structure will occupy two square miles. Plans call for substantial expenditure of state funds for the subsequent development of the facility into a major State park.

The prompt construction of the facility will allow the Port of Baltimore to maintain its authorized channel depth of 42 feet and further accommodate material dredged during the authorized deepening of the channel to 50 feet.[1] There are substantial economic benefits to be gained for the citizens of Maryland and this project has been determined as essential for the development of the Port of Baltimore.

2. The Permit

The permit for this project was issued pursuant to Section 10 of the 1899 Act. Section 9 of the 1899 Act requires the consent of both Congress and the Corps for construction of certain types of structures in or over navigable waters, including "any bridge, dam, dike or causeway over or in any" such waters. Section 10 requires only Corps approval (delegated from the Secretary of the Army) for structures in navigable waters such as wharves, piers, etc., which do not completely span the waterway. The permit was issued pursuant to Section 10 of the 1899 Act because the proposed structure would not completely span the waterway.

3. Proceedings at the District Court

On June 30, 1977, seven months after the issuance of the permit, Petitioners brought this eleven count suit in the United States District Court for the District of Maryland. It challenged various actions of the Corps of Engineers in connection with the Hart and Miller Islands project. Petitioners sought, in Count One, a declaration that the issuance of the permit was unlawful and void for lack of consent of Congress, which they claimed was required on the theory that this project was subject to Section 9 of the 1899 Act.

[1] Rivers and Harbors Act of 1970, Pub. L. No. 91-611, § 101, 84 Stat. 1818 (1970).

Cross-motions for summary judgment were filed as to all counts. The district court (Murray, J.) granted summary judgment for Petitioners on Count One pursuant to Rule 54. It declared that the Corps of Engineers exceeded its authority by issuing the permit without having obtained the consent of Congress (App. 23a-60a). The cross-motions for summary judgment on the remaining ten counts have yet to be ruled upon by the district court.

4. Decision of the Fourth Circuit

On May 28, 1980, the United States Court of Appeals for the Fourth Circuit (Widener and Hall, JJ., and Warriner, D.J.) reversed (App. 1a-21a). The court held that Section 9 applied only to structures which completely span a navigable body of water (App. 20a).

The court of appeals did not confine its interpretation of the meaning of the term "dike" to the dictionary meaning because it found that Section 9 of the Act was ambiguous (App. 7a-14a). It drew that conclusion from this Court's statement in *Wisconsin v. Illinois,* 278 U.S. 367, 413 (1929), that the interrelationship of various segments of Section 10 of the Act was ambiguous and found that such ambiguity applied to Section 9 as well. Given this ambiguity in statutory language, the court of appeals construed the term "dike" in light of both the extensive legislative history before it and the Corps' long-standing and consistent administrative practice.

The court of appeals analyzed the then prevailing precedents of *United States v. Keokuk & H. Bridge Co.,* 45 F. 178 (S.D. Iowa 1890) and *United States v. Rider,* 50 F. 406 (S.D. Ohio 1891). This analysis indicated that Section 9 may well have been intended to require Congressional approval only where agency approval was perceived to be an unconstitutional delegation of legislative power, *i.e.,* for bridges, causeways, dikes, or dams, that completely span a

navigable waterway (App. 14a).[2] In further support of its interpretation, the Fourth Circuit relied on a Corps lecture by the drafter of the 1899 Act which was submitted to Congress in connection with subsequent legislation. The drafter stated that Section 9 applies to structures which extend entirely across a waterway, whereas Section 10 relates to structures which project into, rather than cross, bodies of water (App. 15a-16a).

The Fourth Circuit found that this interpretation of Sections 9 and 10 described by the Act's drafter has been consistently applied over a period of 80 years (App. 17a). Affidavits from Corps officials provided uncontradicted evidence that this interpretation has been applied to numerous projects (App. 16a).[3] Congressional testimony of

[2] In 1890 Congress enacted the first general legislation subjecting obstructions in navigable waters to federal scrutiny. Section 7 of the Rivers and Harbors Act of 1890, 26 Stat. 454, prohibited the construction of wharves, piers, dolphins, booms, dams, weirs, breakwaters, bulkheads, jetties, and "structures of any kind" outside established harbor lines without permission from the Secretary of War. Section 7 also permitted construction, pursuant to state legislative authority, of bridges, bridge draws, bridge piers and abutments, causeways, and "other works" over or in navigable waters of the United States, provided the plans were later approved by the Secretary of War. Thus both the approval of the Secretary of War and the state was required for construction of bridges, causeways, etc. over or in navigable waters. State authorization powers were further curtailed by a proviso to Section 7 which expressly limited them to structures over or in navigable waters wholly within the limits of a single state. This proviso effectively required the approval of the Secretary of War for all structures over or in navigable waters touching more than one state.

[3] The assertion by Petitioners in footnote 24 of their brief that these affidavits "primarily demonstrate Corps approval of dikes within harbor lines, or in bodies of navigable water which touch only one state" ignores geographic fact. A cursory examination of the DeSista affidavit shows Corps approval over the years for numerous projects of massive size in navigable waters that touch the boundaries of more than one state, *i.e.*, over fifteen miles of earth and rock fill in the Columbia River (Oregon and

the Secretary of War further confirmed the long-standing interpretation that Section 10 authorized the Corps to permit or refuse to permit any obstruction to navigation, except the class of structures which extend clear across any navigable waterway (App. 16a).

While Corps regulations promulgated prior to 1977 contained no explicit definition of "dike," published regulations giving effect to the Corps' interpretation are found in the Code of Federal Regulations since its inception. See, *e.g.*, 33 C.F.R. 209.120 (1948); 33 C.F.R. 209.120(b)(1)(a) (1969); 33 C.F.R. 209.120 (1974). This material demonstrates a long-standing administrative interpretation sufficiently weighty to clarify the ambiguity in Section 9.

Finally, the correctness of the Corps' interpretation was recently verified by Congress. During Senate consideration of the Federal Water Pollution Control Act Amendments of 1972, Senator Muskie remarked that Congress "was uniquely aware of the process by which which the dredge and fill permits are presently handled . . . ." 118 Cong. Rec. 33699 (1972) (App. 19a). The Fourth Circuit accepted the Corps' interpretation because, obviously, Congress understood this process, which included the Corps' long-standing interpretation of Sections 9 and 10, and deliberately declined to interfere with it (App. 20a).

The Fourth Circuit concluded that the Hart and Miller Islands project was not a "dike" under Section 9 requiring

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Washington), a dike and fill extending discontinuously for 19 miles along the Columbia River for a low elevation highway, a random stone fill for two miles along the banks of the Ohio River and a park extension by creating fill of 500 feet by 6,000 feet in Lake Erie. Indeed it may be argued that Congress was aware of and tacitly approved of the long-standing Corps practice by virtue of the size and notoriety of certain projects approved pursuant to Section 10 which do not completely span a waterway and were designated as "dikes," "causeways," "roadways," or similar characterizations.

consent of Congress since it would not completely span a navigable waterway.

ARGUMENT

Petitioners principally assert that the permit for construction of the project is invalid for lack of consent of Congress. The decision of the court of appeals correctly rejected that assertion. Petitioners' allegation that a conflict exists between circuits is without merit. Likewise, their allegation that absent a review by this Court public funds may be wasted, is purely speculative. Review by this Court is not warranted.

I.

THE ALLEGED CONFLICT BETWEEN THE FOURTH AND SECOND CIRCUITS DOES NOT JUSTIFY REVIEW BY THIS COURT

Petitioners base their assertion of a conflict in the circuits on a comparison of the Fourth Circuit's decision here with the Second Circuit's decision in *Citizens Committee for the Hudson Valley v. Volpe,* 302 F. Supp. 1083 (S.D. N.Y. 1969), aff'd, 425 F.2d 97 (2d Cir. 1970), cert. denied sub nom. *Parker v. Citizens Comm. for Hudson Valley,* 400 U.S. 949 (1970). That case involved a permit to construct an expressway along the east bank of the Hudson River. There, the district court held that Congressional consent was necessary for construction of a rock dike parallel to the shore of the river, designed to contain fill and thus create new land within the confines of the river to support the highway. In the absence of the legislative history of the Act in the record before it, the court relied on dictionary definitions, and found that the subject structure was a "dike," as the term is used in Section 9. 302 F. Supp., at 1088-891. The Second Circuit affirmed, in an opinion primarily concerned with questions of standing and jurisdiction, with only a cursory mention of the interpretation of the respective coverage of Sections 9 and 10.

Of critical importance here is the fact that the Second Circuit did not have before it, in 1970, the benefit of the hearings on the Federal Water Pollution Control Act Amendments of 1972 (*supra*, at 7). In any event, the record before the Court in *Hudson Valley* was deficient because it did not contain the wealth of legislative and administrative materials which were necessary to a proper analysis of the issue and which were presented to the Fourth Circuit in this case. Given the summary treatment of the issue by the Second Circuit and the absence of a record necessary for proper analysis by it, the alleged conflict between the two circuits is more theoretical than real.

To shore up their argument for granting certiorari, Petitioners eventually shift away from the alleged conflict between the Second Circuit and the Fourth Circuit. Petitioners next claim that the alleged conflict between the two circuits has generated conflicting decisions in three lower courts. As detailed by the Fourth Circuit however, these lower court decisions establish a judicial trend which disregards the Second Circuit's cursory interpretation of Section 9. The result is that ten years after its decision in *Hudson Valley,* the Second Circuit remains isolated in its view of the meaning of Section 9. Contrary to Petitioners' argument, the consistent failure of lower courts to follow the Second Circuit makes review by this Court unjustified at this time.

First, in *Petterson v. Resor,* 331 F. Supp. 1302 (D. Or. 1971), remanded as moot sub nom. *Citizens Committee for the Columbia River v. Callaway,* 494 F.2d 124 (9th Cir. 1974), the court had the benefit of legislative and administrative history materials.[4] The project at issue involved

[4] There is an error at 9a of the Petitioners' Appendix. The text of the Fourth Circuit's opinion states that "In *Petterson v. Resor* . . . the court did have the benefit of legislative and administrative history materials . . . ." The Appendix misquotes the

depositing fill, surrounded by a retention structure, in the South Slough of the Columbia River in order to support an airport runway extension. The district court determined that the project did not involve "dikes" (within the meaning of Section 9) because Congressional consent was required only "for these structures like bridges, dams and dikes, usually larger structures, which are placed across a river and which constitute an obstruction to navigation." 331 F. Supp. 1302, 1306. The Court held that the runway extension did not obstruct navigation and thus Congressional approval was not required.

Second, in *Sierra Club v. Morton,* 400 F. Supp. 610 (N.D. Cal. 1975), a 42 mile canal was in dispute. Because the structure, labeled a canal, would cross and completely dam and obstruct a navigable river, the court determined that it was a "dam" or "dike" within the meaning of Section 9. 400 F. Supp. 610, 626-27. This case was appealed but the question of the respective coverage of Sections 9 and 10 did not survive the court of appeals. *Sierra Club v. Morton,* 610 F.2d 581 (9th Cir. 1979).[5] In any event, while the district court professed to rely on *Hudson Valley,* its holding is consistent with *Petterson.*

Third, in *Citizens Committee for Environmental Protection v. United States Coast Guard,* 456 F. Supp. 101 (D. N.J. 1978) the court considered the application of the 1899 Act to the placement of fill behind retaining walls in the

opinion by printing that "In *Petterson v. Resor* . . . the court did *not* have the benefit of legislative and administrative history materials . . ." (Emphasis added).

[5] Out of this single appellate decision three petitions for certiorari have been generated. As was true with the case before the Ninth Circuit, these three petitions do not present the question of the respective coverage of Sections 9 and 10. *State of California v. Sierra Club* (No. 79-1252, filed Feb. 13, 1980); *Kern County Water Agency v. Sierra Club* (No. 79-1502, filed Mar. 17, 1980); and *Sierra Club v. Andrus* (No. 79-1625, filed Apr. 16, 1980).

Raritan River for the purpose of supporting a highway extension. Rejecting the plaintiffs' argument that the fill constituted a "dam" or "dike," the court determined that the critical question was whether the activity constituted an unreasonable obstruction to navigation. Since the impact of the project on actual navigation was negligible, the court held the Corps was justified in determining that Section 9 did not apply, and that a Section 10 permit was sufficient. 456 F. Supp. at 113-14.

Instead of the alleged conflicting decisions in the lower courts, it appears that the same conclusion reached by the Fourth Circuit has been reached elsewhere.[6] For example, this same conclusion was recently reached by the district court in *Sierra Club v. Leslie Salt Co.*, No. C-72-561-WTS (N.D. Cal. Jan. 15, 1980), appeal docketed, No. 80-4095 (9th Cir. March 3, 1980). In that opinion, which is attached as an appendix hereto ("R. App."), the term "dike" in Section 9 was interpreted as meaning a structure which completely spans a navigable waterway and which obstructs navigation (R. App. 11a).

The alleged conflict between the Second and Fourth Circuits does not justify review by this Court at this time. Arguably, review by this Court might have been justified ten years ago in order to correct the erroneous interpretation put forward in *Hudson Valley*. However, the cases decided in the last ten years demonstrate that *Hudson Valley* has not been followed and that there is no substantial conflict between the circuits to justify review at this time. Indeed, were the Second Circuit now to focus

[6] As further noted by the Fourth Circuit in its exhaustive analysis (App. 10a, n. 6), other courts, without addressing the meaning of "dike," have applied Section 10 where the structure did not completely span the waterway. *United States v. Bailey*, 467 F. Supp. 925 (E.D. Ark. 1979); *United States v. Cameron*, 466 F. Supp. 1099 (M.D. Fla. 1978); *Magno v. Corros*, 439 F. Supp. 592 (D.S.C. 1977); *Environmental Defense Fund v. Alexander*, 467 F. Supp. 885 (N.D. Miss. 1979).

its attention on this issue with the benefit of a complete record and against the background of the hearings on the Federal Water Pollution Control Act Amendments of 1972, there seems little doubt that it would reach the same conclusion as the Fourth Circuit.

II.

THIS CASE DOES NOT PRESENT A QUESTION OF LAW WHICH JUSTIFIES REVIEW BY THIS COURT

The project at issue is one of many which have been undertaken nationwide over the past ten years and longer without Congressional approval. The degree to which confined disposal facilities in navigable waterways, such as the Hart and Miller Islands project, will be utilized in the future is uncertain. While Petitioners mention that substantial funds have been and presumably will be spent on the removal of dredged materials, there is no evidence as to how much, if any, of the dredged materials will be disposed of in containment areas within navigable waterways. (Pet. 14).

Despite Petitioners' contention, the decision below is not plainly wrong. Indeed, we submit that it is plainly correct. The assertion by Petitioners that absent review by this Court at this time millions of dollars of federal and state funds will be wasted is sheer speculation (Pet. 14). This assertion is one which could be made in virtually every case where this Court is asked to review the correctness of government spending. As recently observed in the *Leslie Salt* case, it would be unacceptable for any court to conclude that the failure to obtain Congressional approval would somehow retroactively render illegal those facilities which were already permitted by the Corps under Section 10 (R. App. 14a).

Petitioners incorrectly assert that the Fourth Circuit sought to impermissably enlarge the Corps' jurisdiction. To support the assertion, the Petitioners mention the hypothetical example of a dike which blocked 90 percent of the Mississippi River; next, they suggest that the Corps' interpretation must be wrong because no Congressional approval would be required for such a hypothetical structure (Pet. 17). The Petitioners would prefer an interpretation of the term "dike" to include "any dike" (Pet. 12). If the interpretation sought by Petitioners is adopted, however, the Congress would have to approve a thirty foot diked erosion retaining wall on the shoreline of the Chesapeake Bay (as well as the project which is challenged by Petitioners). In the *Leslie Salt* case, the court rejected such an interpretation because it would have the effect of making illegal the reclamation of vast areas of California, such as the Sacramento-San Joaquin Delta (R. App. 15a). The result is, at least, that the meaning of the term "dike" in Section 9 must be deemed ambiguous. Under the circumstances, the Fourth Circuit's reliance upon extensive legislative and administrative materials is completely justified (*supra*, at 5-7).

Under Section 9, Congress only reserved for itself the approval of diked structures that completely span a navigable waterway. The Fourth Circuit correctly held that the spoil disposal facility at Hart and Miller Islands is subject to Section 10 of the 1899 Rivers and Harbors Act.

CONCLUSION

For the reasons stated, this Court should not issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

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APPENDIX

United States District Court
Northern District of California

No. C-72-561-WTS

Sierra Club, et al.,
Plaintiffs,

vs.

Leslie Salt Company, et al.,
Defendants.

OPINION

In 1972 plaintiffs Sierra Club, Save San Francisco Bay Association, Kent G. Dedrick (collectively Sierra Club) filed suit against defendant Leslie Salt Company (Leslie)[1] claiming that Leslie's levees on Bair Island were illegal obstructions to the navigable waters of the United States in violation of Sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 and 403. The Sierra Club contended that Leslie's levees were illegal because no permits had been issued by the Corps of Engineers, even though the levees were constructed at a time when, and in an area where, the Corps did not claim jurisdiction and did not require permits. The Sierra Club asked that Leslie's levees be declared to be illegal obstructions to navigation

[1] During the course of this litigation, Mobil Oil Estates (Bair Island Investments) Limited (Mobil) acquired Bair Island from Leslie. Leslie and Mobil stand in the same positions, vis-a-vis, The Sierra Club. They are referred to collectively as "Leslie" in this opinion.

and that Leslie be ordered to remove, or in the alternative to refrain from maintaining them. Leslie's answer denied the Sierra Club's allegation and raised a number of affirmative defenses including estoppel and surrender of jurisdiction. Plaintiff has filed a companion motion in limine to exclude evidence on these affirmative defenses. That motion becomes moot as a result of the ruling on this motion to dismiss.

In its present posture this lawsuit only involves Bair Island. More importantly, the sole remaining legal issue in this lawsuit is the legality of the existing levees on Bair Island. The motion involves two sub-issues which have arisen repeatedly in this action: (a) the absence of a private right of action under the circumstances of this case; and (b) the failure to join an indispensable party.

The question whether Sections 9 and 10 of the Rivers and Harbors Act of 1899 give rise to a private cause of action for their enforcement has been resolved by Judge Sweigert in this case in favor of plaintiffs. *Sierra Club v. Leslie Salt Company,* 354 F. Supp. 1099, 1103-05 (N.D. Ca. 1972). Leslie did not appeal from this ruling but Judge Sweigert's ruling has subsequently been confirmed in other cases as the law in this circuit. See *Riggle v. California,* 577 F.2d 579, 582-83 (9th Cir. 1978); *Sierra Club v. Morton,* 400 F. Supp. 610, 622-25 (N.D. Ca. 1975) (appeal pending).

As to the second issue, the court is of the opinion that the motion to dismiss should be granted. Thus, the issue of joining an indispensable party becomes moot.

Sections 9 and 10 of the Rivers and Harbors Act of 1899 are quoted repeatedly in the briefs of the parties and will not be repeated in this opinion. Section 9 requires Congressional approval for construction of any structure (such as Leslie's levees) and Section 10 delegates approval to the Corps of Engineers.

The parties agree that if Section 10 applies then consent or approval by the Corps must be shown, together with the serviceability of the levees.

Has consent been demonstrated? I think it has. Prior to 1972, the Corps had administratively determined that the landward extent of its jurisdiction in the marshland areas of south San Francisco Bay (such as Bair Island) was the "edge of the marsh," which is equivalent to the shoreline on the U.S. Coast and Geodetic survey charts of the area. The Corps did not require permits for construction of the levees around Bair Island because they were landward of the edge of the march. The Corps has consistently maintained that the levees are legal, because they were constructed at a time when and in an area where no permits were required.

In addition, any possible question regarding the legality of the Bair Island levees has been resolved by the Corps' regulations adopted in July, 1977. These regulations permit the continued existence and maintenance of all structures which were constructed at a time when the Corps did not assert jurisdiction over the area in which they are located. 33 C.F.R. § 322.4 provides in pertinent part as follows:

> § 322.4 Structures and work permitted by this regulation. The following structures or work are hereby permitted for purposes of Section 10 and do not require separate Department of the Army permits.
>
> > (c) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or of any currently serviceable structure constructed prior to the requirement for authorization; provided such repair, rehabilitation, or replacement does not result in a deviation from the plans of the original structure, and further provided that the structure to be maintained has not been put to uses differing from uses specified for it in any permit authorizing its original construction;
>
> * * * * * *

> (g) Structures or work completed before 18 December 1968 or in water-bodies over which the District Engineer has not asserted jurisdiction provided there is no interference with navigation.

There is no dispute that Leslie's levees are "structure[s] constructed prior to the requirement for authorization." Until 1972, the Corps did not assert that Leslie's levees lay within the Corps' jurisdiction or that their construction and maintenance required a Corps permit. In fact, Judge Sweigert found that the "dikes . . . have been in place for more than 20 years — and in most cases more than 50 years — without objection by the federal government." *Sierra Club v. Leslie Salt Company,* 412 F. Supp. 1096, 1104 (N.D. Ca. 1977). There is also no dispute that Leslie's levees are "currently serviceable." See Affidavit of D.G. Warren attached as Enclosure 1 to this opinion, which is not controverted. Leslie's levees thus fall within the express provisions of 33 C.F.R. § 322.4(c). The levees also fall within the terms of 33 C.F.R. § 322.4(g) because they were constructed prior to 18 December 1968, and in an area where the Corps had not asserted jurisdiction.

The Corps' permission for Leslie's levees is conclusive in this lawsuit. Congress has exclusive power to regulate structures and obstructions in the navigable waters of the United States. Congress has delegated this power to the Secretary of the Army and the Corps of Engineers under the Rivers and Harbors Act.

The balance of the Sierra Club's opposition to Leslie's motion to dismiss is based on the assertion that Congressional permission under Section 9 of the Rivers and Harbors Act is also required. The only remaining issue then is the applicability of Section 9. As discussed in the paragraphs which follow, Section 9 simply does not apply to the construction and/or maintenance at Leslie's levees.

Leslie stresses that it is only the existing levees, not any potential future development, which is at issue here. If

Leslie's existing levees are legal, that ends the lawsuit, regardless of whether or not any future development would be legal without a Corps of Engineers permit.

The Sierra Club contends that Leslie's levees are subject to the Congressional approval requirement of Section 9 because they are "dikes" within the meaning of that section. The Sierra Club's contention is premised, however, on a broad dictionary definition of the term "dike" which ignores the interrelationship of Sections 9 and 10, their legislative history, and the Corps of Engineers' consistent administrative practice, as well as the untoward results which would flow from this overbroad construction.

The defendant has explored the legislative history of Section 9. I will incorporate this scholarly research in the paragraphs which follow because I believe it to be persuasive on the definition of the word "dike" as intended by Congress.

It is clear that Congress, when it enacted the Rivers and Harbors Act, did not intend to require congressional approval for every wall, embankment or structure built in the navigable waters of the United States. For example, the first clause of Section 10 states that "[t]he creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is prohibited. . . . " 33 U.S.C. § 403. Nonetheless, it has been repeatedly held that Section 10 requires only the approval of the Secretary of the Army and the Corps of Engineers, not Congressional approval, for the construction of the structures enumerated or for the conduct of dredging and filling operations. *E.g., Wisconsin v. Illinois,* 278 U.S. 367, 413 (1929). And yet, "breakwaters," "bulkheads," "jetties," and "weirs" (all of which are specifically enumerated in Section 10) could all be considered "dikes" within the dictionary definition of that term. Similarly, virtually all dredging and filling operations require some sort of embankment or retaining wall to hold the fill in place; these structures could also be

considered "dikes" within the broad definition of that term. Clearly, Congress did not intend such a construction, both because it would render Section 10 meaningless and because it would make permit requirements turn on questions of pure semantics. The question is: what did Congress intend?

Sections 9 and 10 establish a two-tier system of governmental approvals for projects in navigable waters. Certain classes of structures and projects require only the approval of the Corps of Engineers under Section 10. Other facilities require Congressional approval under Section 9. Semantics aside, the types of structures described in Sections 9 and 10 (as well as the legislative history of those sections discussed below) clearly indicate that Congress intended to require its approval only for those *major* structures which *cross* navigable waterways and thereby obstruct navigation. The four structures named in Section 9 are all of this type: bridges, dams, dikes and causeways. Congress, on the other hand, did *not* intend to require its approval for every minor bulkhead, embankment or other structure built in the navigable waters of the United States, if for no other reason than that such a requirement would be hopelessly cumbersome and impracticable. Sections 9 and 10 "should be construed in light of the administrative exigencies which prompted the delegation of authority [to the Corps of Engineers] in the succeeding clauses." *Wisconsin v. Illinois,* 278 U.S. 367, 412 (1929).

The test of the applicability of Section 9 must therefore be a *functional* one, not a semantic one. That test was succinctly described by the Court in *Petterson v. Resor,* 331 F. Supp. 1302 (D. Ore. 1971):

> The legislative history shows that Congress enacted the Rivers and Harbors Appropriation Act of 1899 as a comprehensive plan for keeping our interstate waterways clear of unreasonable obstructions and structures. It required approval of the federal government for work on navigable interstate waterways.

> Every structure built in a navigable waterway required the approval of the Chief of Engineers and the Secretary of War (now the Secretary of the Army). *In addition, for those structures like bridges, dams and dikes, usually larger structures, which are placed across a river and which constitute an obstruction to navigation,* Congressional consent was required. This distinction was written into the law apparently because of the belief that Congress could not constitutionally delegate to the Secretary of War or to any other agency the authority to permit an obstruction of a navigable waterway. *Id.* at 1306 (emphasis added).

The language of Sections 9 and 10 supports this distinction: that Congressional approval is required only for structures which cross a navigable waterway and which constitute an obstruction to navigation. The first proviso to Section 9, which in effect delegates Congress' approval power to the legislature of a State in certain instances, provides:

> That such structures [bridges, dams, dikes and causeways] may be built under authority of the legislature of a State *across* rivers and other waterways *the navigable portions* of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced. . . . 33 U.S.C. § 401 (emphasis added)

Section 10, on the other hand, does not refer to obstructions to navigable waterways, but rather to "obstruction[s] . . . to the navigable capacity of any of the waters of the United States." In other words, Section 10 applies to structures which affect navigation, even if they do not physically obstruct it. See, *e.g., United States v. Republic Steel Corp.*, 362 U.S. 482, 486 (1960). Section 9, by contrast, applies to those enumerated structures which physically obstruct navigation because they are built *across* a navigable waterway. *Petterson v. Resor, supra.*

The legislative history of Sections 9 and 10 also clearly reinforces this distinction. The current statutory provisions were added to the 1899 Rivers and Harbors Act literally at the last minute without any Congressional debate. These sections, along with Sections 11-20, were added wholesale because they were felt to be merely clarifications of existing law. 32 Cong. Rec. 2297-2298 (Feb. 24, 1899); *United States v. Republic Steel Corp., supra* at 486. Sections 9 and 10 (which were originally Sections 12 and 13 of the Senate version of H.R. 11795) were intended to replace Section 7 and part of Section 10 of the Rivers and Harbors Act of 1890, 26 Stat. 454 (1890).

The "obstruction to the navigable capacity" language of the current Section 10 was found in Section 10 of the 1980 Act. Significantly, however, Section 7 of the 1890 Act, which formed the basis of most of the current Sections 9 and 10, prohibited the construction of: any wharf, pier, dolphin, boom, *dam,* weir, breakwater, bulkhead, jetty or structure of any kind . . . in such a manner as shall obstruct or impair *navigation,* commerce, or anchorage" of the navigable waters of the United States without the approval of the Secretary of War. 26 Stat. 454 (1890) (emphasis added). Section 7 also prohibited the construction of any bridges or causeways under the authority of a state legislature without the approval of the Secretary of War. The term "dike" was not used in either Section 7 or Section 10.

The revisions which resulted in the 1899 Act effected certain slight but significant changes. All of the structures enumerated in the former Section 7 *except dams* were not prohibited (in the absence of federal permission) if they obstructed the *navigable capacity* of the waters of the United States, not just if they obstructed navigation. Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403. Dams, on the other hand, were included with bridges and causeways and were prohibited (absent federal permission) if they obstructed *navigation*. Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401. These

structures obstruct navigation because they are built *across* navigable waterways. "Dikes" were added to this latter group. In view of the origin of the current statutory provisions, the term "dike" must be viewed as being similar to the term "dam." These structures, which now require Congressional approval, are built *across* navigable waterways and thereby *obstruct* navigation.

The debates in 1890 also reflect Congress' overriding concern with structures which were built *across* navigable waterways and which obstructed navigation. Section 7 of the proposed 1890 Act (H.R. 9486) was scarcely debated. However, Sections 4 and 5 of H.R. 9486 were hotly debated. These sections proposed to authorize the Secretary of War to order the removal of bridges, particularly railway bridges, across navigable waters which he found to be obstructions to navigation. *See, e.g.,* 21 Cong. Rec. 5144-5146 (May 22, 1890) remarks of Reps. Breckenridge, Henderson and Blanchard); 21 Cong. Rec. 5397-5403 (May 28, 1890) (remarks of Reps. Blanchard, McCreary, Breckenridge and Grosvenor); 21 Cong. Rec. 8602-8607 (August 15, 1890) (remarks of Sens. Gray, Vest and Dolph). It is clear from the debates that Congress was most concerned with bridges and other structures built *across* navigable waterways, because these structures actually obstructed navigation, and intended to exert some form of direct federal control over such direct obstructions to navigation. *See, e.g.,* 21 Cong. Rec. 5401, 5402, 5403, 8604, 8605 (May 28 and August 15, 1890).

The distinction between obstructions to navigation and obstructions to navigable capacity contained in the 1890 Act and carried over into the 1899 Act is by itself highly instructive of the meaning of the term "dike" in Section 9 of the 1899 Act. In addition, various Congressional documents from the last decade of the nineteenth century shed further light on the meaning of this term. The laws regulating the navigable waters of the United States were frequently revised during the end of the nineteenth century. By Section 2 of the Act of June 3, 1896, 29 Stat.

234, Congress directed the Secretary of War to make a compilation of the general laws relating to the maintenance, preservation and protection of the navigable waters of the United States, together with recommendations for their revision. This compilation (which was prepared for the Secretary by the Corps of Engineers) was transmitted by the Secretary to the Speaker of the House on February 13, 1897. H.R. Doc. No. 293, 54th Cong., 2d Sess. (1897). The Secretary's report contained a "draft of [a] proposed act revising and enlarging [the] laws for [the] protection of navigable waters." H.R. Doc. No. 293 at 8-13. Sections 1 and 2 of the proposed act are *identical* to Sections 9 and 10 of the Rivers and Harbors Act of 1899. In fact, it was this very proposed act which was introduced and adopted intact by Congress in 1899. 32 Cong. Rec. 2297-2298 (Feb. 24, 1899).

The proposed act was drafted by the Corps of Engineers, in particular by G.W. Koonce (later Judge Koonce), then with the office of the Chief of Engineers. Fortunately for later generations, Judge Koonce gave a speech on April 23, 1926 in which he described the genesis of Sections 9-20 of the Rivers and Harbors Act of 1899. Fortunately again, Judge Koonce's speech was submitted to Congress in testimony by Brig. Gen. R.H. Groves, Deputy Director of Civil Works in the office of the Chief of Engineers, before the House Committee on Public Works. *Water Pollution Control Legislation — 1971 (Oversight of Existing Programs): Hearings before the House Comm. on Public Works,* 92d Cong., 1st Sess. 261, 284-291 ("1971 Hearings"). In his speech, Judge Koonce had occasion to comment on the precise issue before this Court. He stated in pertinent part:

> Section 9 of the act [the Rivers and Harbors Act of 1899] applies to that class of structure such as bridges and dams *which extend entirely across a waterway,* and which if built without proper regulation and control may completely block navigation.
>
> * * * * * *

> Section 10 relates to the construction of works in the nature of wharves, piers, jetties, and the like, *which project into, rather than across*, the bodies of water in which they are located; and also to making excavations or fills, or change of any kind in the condition or capacity of navigable waterways.

1971 Hearings at 288-289 (emphasis added).

Judge Koonce's statements resolve whatever ambiguity may have existed in the meaning of Sections 9 and 10 of the 1899 Act.

Finally, this interpretation of Sections 9 and 10 is confirmed by 80 years of consistent administrative practice by the Corps of Engineers under the statute. The Corps of Engineers has defined "dike" for the purposes of Section 9 as follows:

> The term "dike" means an embankment, low dividing wall, or other protective barrier that *completely spans a navigable water of the United States* and that may obstruct interstate water-borne commerce. 33 C.F.R. § 321.2(c). (emphasis added).

As the Supreme Court observed in connection with interpreting Section 10 of the Rivers and Harbors Act:

> This construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute. *Wisconsin v. Illinois, supra,* 278 U.S. at 413.

The term "dike" in Section 9 thus refers to structures which completely span a navigable waterway and which obstruct navigation. Leslie's levees on Bair Island are not "dikes" within the meaning of Section 9 both because they do not span a navigable waterway (whether that waterway be considered to be San Francisco Bay as a whole or a particular creek or slough, such as Redwood Creek or Corkscrew Slough) and because they do not obstruct navigation. Leslie's levees simply enclose former marsh-

land. *Sierra Club v. Leslie Salt Company*, 412 F. Supp. 1099 (N.D. Ca. 1976). Section 9 is therefore not applicable to the Bair Island levees.

The Sierra Club's contention that Leslie is subject to the Section 9 approval requirements is based solely on three cases: *Citizens Committee for the Hudson Valley v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd* 425 F.2d 97 (2d Cir. 1970); *Sierra Club v. Morton*, 400 F. Supp. 610 (N.D. Ca. 1975), *aff'd in part and rev'd in part on other grounds sub nom. Sierra Club v. Andrus*, No. 76-1464 (9th Cir., Oct. 31, 1979); and *Hart and Miller Islands Area Environmental Group v. Corps of Engineers*, 459 F. Supp. 279 (D. Md. 1978). The Sierra Club not only failed to examine the legislative history of the statute and the administrative practice thereunder, it neglected to mention that *Petterson v. Resor, supra*, reaches precisely the opposite conclusion. More importantly, the *Petterson* case examines the underlying legislative history and administrative practice, whereas the *Citizens Committee for the Hudson Valley* line of cases expressly disclaims any such examination. Compare *Petterson v. Resor*, 331 F. Supp. at 1305-1306, with *Citizens Committee for the Hudson Valley*, 302 F. Supp. at 1089. As the *Petterson* court observed:

> Here, defendants presented the evidence of legislative history and consistent administrative practice which was not before the court in *Hudson Valley*. This evidence supports the defendants' contention that Section 401 requires Congressional consent for dikes only when they are obstructions to navigation. To accept plaintiffs' contention that any structure within the dictionary definition of a dike requires Congressional consent is to ignore the language and purpose of the legislation and its interpretation for almost 70 years.

331 F. Supp. at 1306.

The *Petterson* court went on to discuss the practices of the Corps of Engineers and the unreasonable results that would follow from the plaintiffs' construction of Section 9

(which is identical to the one urged by the Sierra Club here):

> In *Wisconsin v. Illinois*, 278 U.S. 367, 49 S. Ct. 163, 73 L. Ed. 426 (1928), the court examined the practice of permitting the Secretary of War to issue permits under Section 403 without Congressional approval and stated:
>
> > This construction of § 10 [of the Rivers and Harbors Appropriation Act of 1899 (33 U.S.C. 403)] is sustained by the uniform practice of the War Department for nearly 30 years. Nothing is more convincing in interpreting a doubtful or ambiguous statute. *Id.* at 413, 49 S. Ct. at 170.
>
> Since that time, the Secretary of the Army and the Corps of Engineers have followed this practice. In 1937, the Secretary issued a permit to construct a fill in the East River to support a 9,000-foot runway for the LaGuardia Airport; in 1942, he issued a permit for a 12,000-foot runway in the Jamaica River for the John F. Kennedy Airport (then Idlewild); in 1960, he granted a permit for runway extensions into San Francisco Bay for the San Francisco International Airport; and nine years later, he authorized the Oakland International Airport to construct diking and dredge filling of the San Francisco Bay for runway extensions.
>
> There are numerous other instances in which the Secretary authorized major projects under Section 403, even when the work to be performed was loosely referred to as a "dike," if the proposed improvement did not obstruct navigation.
>
> To accept the plaintiffs' construction of Section 401 would make Section 403 meaningless because "jetties," "breakwaters" and "fills," mentioned in Section 403, all come within plaintiffs' dictionary definition of dikes.

331 F. Supp. at 1306.

As another court subsequently observed, "[t]he impact of *Citizens Committee for Hudson Valley* . . . has been

substantially altered by the reasoning of *Petterson v. Resor.*" *Citizens Committee for Environmental Protection v. United States Coast Guard,* 456 F. Supp. 101, 113 (D.N.J. 1978) (citations omitted).

The *Sierra Club v. Morton* decision (involving the Peripheral Canal) cited by the Sierra Club does not support the Sierra Club's contention. Judge Renfrew did hold that Congressional approval under Section 9 was necessary, but that holding was expressly predicated on a finding that "[a]t the point where the Canal crosses the Middle River, the Canal will result in the *complete damming* of the river. Furthermore, there is presently no provision for the passage of boats past the Canal at this location." 400 F. Supp. at 626 (emphasis added). Thus, Judge Renfrew simply held that a structure which completely spans a navigable waterway and obstructs navigation requires Congressional approval under Section 9.

Finally, as the *Petterson* court observed, the Sierra Club's construction of Section 9 is not only hopelessly cumbersome, it would also lead to untoward and completely unacceptable consequences. The Corps of Engineers has consistently regulated the construction of such projects as major airports, including LaGuardia and Kennedy in New York and San Francisco and Oakland on the West Coast, under Section 10 because they are not built across a navigable waterway and do not obstruct navigation. Are these airports now to be declared illegal? Furthermore, Leslie's levees are built on former *marshland,* which the Corps of Engineers not only considered to be beyond its jurisdiction, but also which Leslie and its predecessors in interest were *required* to reclaim by the construction of levees and drains under the Arkansas Swamp Act. Act of September 28, 1850, 9 Stat. 519, now codified at 43 U.S.C. §§ 982 and 983. Bair Island was segregated as swamp and overflowed land on the federal township plats, and federal swamp and overflowed patents nos. 176, 190 and 191 were issued to Leslie's predecessors in interest covering all of Bair Island. *See* Exhibits 132 and 133 to the Statement of

Facts filed by Leslie on or about May 16, 1975 in Action No. C-73-2294; Admissions Nos. 1, 93 and 94 of the Corps of Engineers' Admissions of Fact and Genuineness of documents filed in Action No. C-73-2294; Admission No. 3 of Sierra Club's Admissions of Fact and Genuineness of Documents, filed on or about March 13, 1975. If the Sierra Club's contention were to be sustained, the reclamation of Bair Island (which includes the construction of levees) by Leslie and its predecessors, which was directed by the Arkansas Swamp Act, as well as the reclamation of additional vast areas of California, such as the Sacramento-Joaquin Delta, would be illegal. The absurdity of this result clearly shows the invalidity of the Sierra Club's contention. Moreover, since the levees were constructed pursuant to a Congressional mandate to reclaim swamp and overflowed lands, it can be said that Congressional approval, if necessary, has been given.

Whatever else may be said about Leslie's levees, it is clear that they are not built across a navigable waterway of the United States. They were built on historic marshland. They do not wholly cross the San Francisco Bay or any of the navigable sloughs which border or cross Bair Island. They are therefore not dikes within the meaning of Section 9, and no Congressional permission was required for their construction or for their continued existence.

In view of the conclusion reached, the defendants' motion to dismiss is GRANTED.

Dated: January 15, 1980.

OWEN E. WOODRUFF, JR.,
United States Magistrate